CASE NO. 2010-TS-00109

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MICHAEL AND MARY ROBICHAUX,

APPELLANTS

v.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY; and JAY FLETCHER INSURANCE,

APPELLEES

BRIEF OF APPELLEES NATIONWIDE MUTUAL FIRE INSURANCE COMPANY and JAY FLETCHER INSURANCE

ON APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSISSIPPI (ORAL ARGUMENT NOT REQUESTED)

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March 30, 2011

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2008-CA-02011

MICHAEL AND MARY ROBICHAUX — **APPELLANTS**

VERSUS

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY; AND JAY FLETCHER INSURANCE — **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Michael Robichaux, plaintiff/appellant;
2. Nationwide Mutual Fire Insurance Company, defendant/appellee;
3. Jay Fletcher Insurance, defendant/appellee;
4. H. Mitchell Cowan, Watkins Ludlam Winter & Stennis, P.A., attorney for defendants/appellees;
5. Laura L. Hill, Watkins Ludlam Winter & Stennis, P.A., attorney for defendants/appellees;
6. Janet D. McMurtray, Watkins Ludlam Winter & Stennis, P.A., attorney for defendants/appellees;
7. Daniel F. Attridge, P.C., Kirkland & Ellis, LLP, attorney for defendants/appellees;
8. Christopher Landau, P.C., Kirkland & Ellis LLP, attorney for defendants/appellees;
9. Kenneth S. Clark, Kirkland & Ellis, LLP, attorney for defendants/appellees;
10. Brandon Jones, Barton Law Firm, PLLC, attorney for plaintiffs/appellants;

11. W. Harvey Barton, Barton Law Firm, PLLC, attorney for plaintiffs/appellants;

12. David Baria, Baria Law Firm, PLLC, attorney for plaintiffs/appellants

Respectfully submitted, this the 30th day of March, 2011.

H. Mitchell Cowan
Attorney of Record for Defendants/Appellees

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IN THE SUPREME COURT OF MISSISSIPPI
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MICHAEL AND MARY ROBICHAUX — **APPELLANTS**

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STATEMENT REGARDING ORAL ARGUMENT

Defendants respectfully submit that oral argument is unnecessary and unwarranted. This appeal involves a straightforward application of the settled summary judgment standard, not a legal issue of insurance policy interpretation. The trial court below granted defendants summary judgment for the simple reason defendants presented evidence that plaintiffs' losses were caused by flooding (a peril concededly excluded under the policy), and plaintiffs presented no contrary evidence in response to that motion. Indeed, ***plaintiffs' own causation expert*** agreed with defendants' expert engineer that the losses at issue here were caused by flooding, and plaintiffs in fact received full compensation for their losses through flood insurance. Because plaintiffs failed to create a genuine issue of material fact as to the existence of any uncompensated loss caused by a covered peril, the trial court properly granted defendants summary judgment.

INTRODUCTION

In the wake of Hurricane Katrina, there have been many cases raising difficult issues involving the interpretation of insurance policies. This case, however, is not one of them. The insurance policy at issue here (like most standard insurance policies) unambiguously excludes losses caused by flooding, and the evidence here establishes that plaintiffs' losses were caused by flooding. Indeed, ***plaintiffs' own causation expert*** agreed with defendants' expert engineer that those losses were caused by flooding, and plaintiffs sought—and received—full compensation for those losses from flood insurance. In response to defendants' summary judgment motion, plaintiffs presented no evidence of uncompensated losses from a covered peril. Accordingly, as the trial court recognized, plaintiffs failed to establish the existence of a genuine issue of material fact, and defendants are entitled to summary judgment as a matter of law. The point here is simple: plaintiffs can neither recover for losses caused by flooding nor recover twice for the same losses.

STATEMENT OF THE ISSUE

Whether the trial court properly granted defendants summary judgment where: (1) plaintiffs' own causation expert agreed with defendants' expert engineer that the losses at issue here were caused by flooding, and (2) plaintiffs were fully compensated for those losses by flood insurance.

STATEMENT OF THE CASE

This is an insurance coverage case arising out of Hurricane Katrina. Plaintiffs Michael and Mary Robichaux brought this case against defendants Nationwide Mutual Insurance Company and Jay Fletcher Insurance challenging the denial of coverage under their Nationwide homeowners policy. The trial court granted summary judgment in defendants' favor, and plaintiffs now appeal.

A. Background

Plaintiffs owned a property in Pascagoula, Mississippi, located a few hundred feet from a canal and a few thousand feet from the Gulf of Mexico. (*See* R. 513-514, R.E. 18 at Exh. 2; R. 583, R.E. 18 at Exh. 3 (showing same map and demonstrating plaintiffs' proximity to the Gulf of Mexico).) Plaintiffs insured their property through a standard HO-23-A homeowners policy issued by Nationwide (No. 6323 MP 587646), with the following coverage limits (subject to the terms, conditions, limits, endorsements, and exclusions set forth in the policy):

- Coverage A—Dwelling: $131,000;
- Coverage B—Other Structures: $13,100;
- Coverage C—Personal Property: $97,405; and
- Coverage D—Loss of Use: $26,200.

(*See* R. 585, R.E. 18 at Exh. 4; R. 524, R.E. 18 at Exh. 2.)

Plaintiffs' homeowners policy contained a standard flood exclusion approved by the Mississippi Department of Insurance. (*See* R.138, R.E. 3 at Exh. A (flood exclusion); R. 527-28, R.E. 18 at Exh. 2.) That exclusion provided in relevant part:

> ***Property Exclusions (Section I)***
>
> 1. We do not cover loss to any property resulting directly or indirectly from any of the following. Such a loss is excluded even if another peril or event contributed concurrently or in any sequence to cause the loss.
>
> . . .
>
> b) Water or damage caused by water-borne material. Loss resulting from water or water-borne material damage described below is not covered even if other perils contributed, directly or indirectly to cause the loss. Water and water-borne material damage means:
>
> (1) ***flood, surface water, waves, tidal waves, overflow of a body of water, spray from these, whether or not driven by wind.***

(R. 138, R.E. 3 at Exh. A (emphasis added).) In light of this exclusion, plaintiffs separately insured their property with a National Flood Insurance policy. That policy carried limits of

$136,500 for building damage and $70,400 for personal property damage. (*See* R. 517, R.E. 18 at Exh. 2.)

On August 29, 2005, plaintiffs' property sustained severe damage from Hurricane Katrina. Immediately after the hurricane, plaintiffs made claims for coverage under ***both*** their Nationwide homeowners policy and their National Flood Insurance policy. (*See* R. 845-6, R.E. 18 at Exh. 8; R. 529, 545, R.E. 18 at Exh. 2.) The Federal Flood Insurance Program paid plaintiffs their ***full policy limits*** of $136,500 for flood damage to their dwelling and $70,400 for flood damage to their personal property. (*See* R. 869, R.E. 18 at Exh. 15; R. 870, R.E. 18 at Exh. 16; R. 871, R.E. 18 at Exh. 17; R. 549-50, R.E. 18 at Exh. 2; R. 780, R.E. 18.) As the independent flood adjuster put it, "[t]here is little doubt that the portion of the structure addressed on our estimate was destroyed by the surge and wave action which is a flood as defined by the policy." (R. 867, R.E. 18 at Exh. 14.)

Nationwide, for its part, retained an engineering firm, HAAG Engineering, to assess the cause of plaintiffs' losses. (*See* R. 839, R.E. 18 at Exh. 8.) A HAAG engineer inspected plaintiffs' property, reviewed photographs of the property after the hurricane, and prepared a damage assessment report. (*See* R. 855-63, R.E. 18 at Exh. 12.) That report concluded that "the Robichaux residence and garage were destroyed by Hurricane Katrina's storm surge." (R. 860, R.E. 18 at Exh. 12.) In support of that conclusion, the report included photographs of plaintiffs' slab foundation as it appeared after the hurricane, tidal surge data, and other evidence showing the proximity of plaintiffs' property to the Gulf of Mexico. (R. 855-63, R.E. 18 at Exh. 12.) On March 24, 2006, Nationwide concluded that plaintiffs' "loss was caused by water or water-borne

material as defined in [their] policy" and denied their claim. (R. 864, R.E. 18 at Exh. 13; *see* R. 831-2, R.E. 18 at Exh. 8.)[1]

B. Proceedings Below

Plaintiffs filed this lawsuit in the Circuit Court of Jackson County, Mississippi in October 2006. Nationwide timely removed the case to federal court on the basis of diversity jurisdiction, (*see* R. 35-45, R.E. 2 at Exh. A,) but the case was remanded to state court in May 2007. (*See* R. 302-08, R.E. 6.)

Subsequently, in an attempt to resolve coverage disputes informally, Nationwide made a business decision to re-evaluate pending claims. As part of that process, Nationwide in November 2007 conducted a comprehensive review of all information related to plaintiffs' claim under their homeowners policy. (*See* R. 872-4, R.E. 18 at Exh. 18-19.) Based on this re-review, Nationwide tendered plaintiffs a payment of $37,266.66, which was ***not*** conditioned on their release of any claims. (*See* R. 872, R.E. 18 at Exh. 18.) Plaintiffs, however, refused the offer and returned the check. (*See* R. 556-57, R.E. 18 at Exh. 2.)

After the recusal of other judges, on May 23, 2008 this Court appointed the Honorable Billy G. Bridges to preside over this matter. The parties thereupon engaged in extensive discovery. Plaintiffs retained an engineer, William Mott, to determine the cause of their losses. At his deposition, Mott ***did not dispute*** the HAAG engineers' conclusion that plaintiffs' losses were caused by flooding, not wind. (*See* R. 658, R.E. 18 at Exh. 5.)

After the completion of discovery, the parties filed cross-motions for summary judgment. Plaintiffs sought partial summary judgment with respect to the meaning of the so-called anti-

[1] During the course of investigating the claim, Nationwide provided plaintiffs with a $2,500 advance on additional living expenses, and $500 for food loss. (*See* R. 844, R.E. 18 at Exh. 8; R. 550, R.E. 18 at Exh. 2; R. 847-9, R.E. 18 at Exh. 9; R. 840-2, R.E. 18 at Exh. 8; R. 850-2, R.E. 18 at Exh. 10.)

concurrent causation clause in their homeowners policy, which provided that losses caused by excluded perils are excluded "even if another peril or event contributed concurrently or in any sequence to cause the loss." (*See* R. 954-93 (plaintiffs' motion), R.E. 20; R. 138, R.E. 3 at Exh. A (anti-concurrent causation clause).) Defendants, for their part, sought plenary summary judgment on all claims on a variety of grounds, including the fundamental ground that plaintiffs had failed to create a genuine issue of material fact as to whether they had suffered any uncompensated losses from a covered peril. (*See* R. 921-53, R.E. 19 (defendants' motion).)

The trial court heard argument on the motions on September 2, 2009, shortly before the scheduled trial date. At that hearing, the court first entertained plaintiffs' motion and granted it, agreeing with plaintiffs that the anti-concurrent causation clause in their homeowners' policy was "ambiguous." (Sept. 2, 2009 Tr. of Proceedings at 47.) The court then turned to defendants' motion for summary judgment on all claims and granted that motion too, thereby effectively mooting the earlier ruling granting plaintiffs' motion regarding the anti-concurrent causation clause. (*See id.* at. 132.) Contrary to plaintiffs' assertion, (*see* Pls.' Br. at 7, 9,) there was no "confusion" about the scope of the trial court's oral ruling granting defendants summary judgment on all claims; indeed, plaintiffs' counsel recognized that the court had "granted summary judgment on all claims," and thereby "ended the case." (Sept. 2, 2009 Tr. at 138.)

Just over a month later, on October 5, 2009, the trial court entered a 16-page order setting forth extensive written findings of fact, conclusions of law, and a final judgment in defendants' favor. (*See* R. 2002, R.E. 31 at 1.) As the trial court explained, "there is no genuine dispute that the damage to Plaintiffs' home was caused by excluded flooding," because ***both*** plaintiffs' own engineer (Mott) ***and*** defendants' engineer (HAAG) "determined that the Robichauxes' property was destroyed by flooding." (R. 2007, R.E. 31 at 6.) In particular, plaintiffs' expert Mott "determined that the property was ultimately destroyed by Hurricane Katrina's flood waters."

Id.; *see also id.* ("Even after reviewing HAAG's analysis, Mr. Mott did not 'take issue with anything [HAAG] said.'"). In addition, "[p]laintiffs sought and accepted $206,900 in flood insurance proceeds—full policy limits—as a result of the flood damage to their property." (R. 2008, R.E. 31 at 7.) Accordingly, plaintiffs offered (1) "no evidence that the damage to their dwelling was uncompensated," (R. 2010, R.E. 31 at 9); (2) "no evidence of any uncompensated loss to their other structures," (R. 2011, R.E. 31 at 10); and (3) "no evidence to show that the damage to their contents was caused by wind." (*Id.*; *see also* R. 2009, R.E. 31 at 9 ("Plaintiffs concede they have ***no evidence*** that any of the damage to their property was actually caused by wind, a covered peril."); R. 2012, R.E. 31 at 11 ("Plaintiffs concede they have ***no evidence*** that their home was damaged much less rendered uninhabitable by wind—a covered peril.") (emphasis added).) Nor did plaintiffs offer any evidence to create a genuine issue of material fact on any of their other coverage claims. (R. 2011-14, R.E. 31 at 10-13.) Finally, plaintiffs failed to state a claim for equitable estoppel, equitable reformation, or fraud based on alleged oral representations made by the insurance agency from which they bought their policy, Jay Fletcher Insurance. As the trial court explained, plaintiffs failed to create a genuine issue of material fact as to whether they actually relied on such representations, and any such reliance would have been unreasonable given that the alleged representations squarely conflicted with the written policy. (R. 2015-16, R.E. 31 at 14-15.)

On October 8, 2009—three days after the trial court entered its order granting defendants summary judgment—this Court decided *Corban v. USAA Ins. Agency*, 20 So.3d 601 (Miss. 2009) (en banc). The next day, plaintiffs moved for reconsideration, asserting that "[i]n its Findings of Fact, Conclusions of Law and Judgment, the Court relies heavily on the anti-concurrent cause language found in the subject homeowner's policy," and that such reliance was unwarranted in light of *Corban*. (R. 2019, R.E. 32.) The trial court denied that motion on

December 28, 2009, (*see* R. 2030, R.E. 34,) and plaintiffs noticed this appeal on January 19, 2010.

SUMMARY OF THE ARGUMENT

Plaintiffs ask this Court to decide various issues of policy interpretation, but they did not lose below based on any of those issues. Rather, they lost below because, in response to defendants' motion for summary judgment, they failed to present any evidence that the losses at issue here were caused by wind (a concededly covered peril) as opposed to flooding (a concededly excluded peril), and indeed plaintiffs were fully compensated for those losses by flood insurance. That simple point is the beginning and the end of this case.

In order to defeat a motion for summary judgment, the nonmoving party must show that there is a genuine issue of material fact that warrants a trial. Plaintiffs here failed to make any such showing. Rather, defendants produced evidence showing that all of the losses at issue here were caused by flooding, and plaintiffs presented no evidence to the contrary. Indeed, plaintiffs' own causation expert William Mott ***agreed with defendants' expert engineer*** that the losses at issue here were caused by flooding. Nor did plaintiffs dispute the evidence that they were fully compensated for those losses by flood insurance. Given the trial court's repeated finding, which plaintiffs do not challenge on appeal, that they presented "no evidence" that their losses were caused by anything other than flooding for which they have been fully compensated, the court properly granted defendants summary judgment. There is simply no basis for a trial where, as here, one side presents no evidence to support its position, so that no reasonable jury could rule in that side's favor as a matter of law. This is a straightforward summary judgment case, and plaintiffs' various arguments about policy interpretation are wholly irrelevant.

STANDARD OF REVIEW

"The well-established standard of review on a trial court's grant of summary judgment is *de novo*." *Mladineo v. Schmidt*, 52 So.3d 1154, 1160 (Miss. 2010) (en banc).

ARGUMENT

The Trial Court Properly Granted Defendants Summary Judgment Where (1) Plaintiffs' Own Causation Expert Agreed With Defendants' Expert Engineer That The Losses At Issue Here Were Caused By Flooding, And (2) Plaintiffs Were Fully Compensated For Those Losses By Flood Insurance.

Plaintiffs' various legal arguments regarding the interpretation of their homeowners policy with Nationwide miss the mark. Plaintiffs did not lose below because of any such interpretation. Indeed, only a single point of policy interpretation is relevant here, and that point is undisputed: plaintiffs' homeowners policy with Nationwide expressly excluded losses caused by flooding. (*See* R. 77, R.E. 2 at Exh. A.) In response to defendants' evidence that all of the losses at issue here were caused by flooding, and that plaintiffs had been fully compensated for those losses by flood insurance, plaintiffs presented ***no*** evidence to the contrary. This is precisely the situation for which summary judgment exists, and the trial court in this case properly granted summary judgment to defendants.

The strange thing is that plaintiffs do not seriously challenge the trial court's ruling that, in response to defendants' motion for summary judgment, they failed to create a genuine issue of material fact with respect to the cause of their losses. Rather, plaintiffs allege that the trial court misconstrued their homeowners policy with Nationwide in a number of respects. But plaintiffs do not identify how any of those alleged errors had any bearing whatsoever on the decision that they seek to reverse. Put simply, there is a fundamental disconnect between the ruling below and plaintiffs' opening brief in this appeal. Plaintiffs are obviously free to discuss whatever issues they please on appeal, but cannot hope to prevail without successfully challenging the basis for the adverse decision below.

A. The Trial Court Correctly Rejected Plaintiffs' Various Claims.

The key point here, which plaintiffs do not address, is that ***their own causation expert***, William Mott, agreed with Defendants' expert engineer that the losses at issue here were caused by flooding. As the trial court noted, "Plaintiffs' engineer determined that the Robichauxes' property was destroyed by flooding." (R. 2008, R.E. 31 at 7; *see also* R. 2004, R.E. 31 at 3 ("Plaintiffs' engineer admits that Plaintiffs' property was inundated with (at least) 6.3 feet of storm surge flooding over the home's ground elevation."); R. 2009, R.E. 31 at 8 ("Plaintiffs' own engineering expert could not opine that wind had damaged the Robichaux property prior to the storm surge."); R. 2011, R.E. 31 at 10 ("Plaintiffs' own engineer determined that the contents would have been 'saturated' by the storm surge flooding, and he could not opine that any contents were in fact damaged by wind.").) Plaintiffs have apparently chosen to take an "ostrich" approach toward Mott, failing even to ***mention*** him in their opening brief, except insofar as they once block-quote a passage of the trial court's decision that mentions him. (*See* Pls.' Br. at 23 (quoting R. 2009-10, R.E. 31 at 8-9).) But plaintiffs cannot expunge Mott from this case by simply ignoring him. He was their causation expert, and he failed to create a genuine issue of material fact on causation.

Because plaintiffs failed, in response to defendants' motion for summary judgment, to create a genuine issue of material fact on this dispositive issue, the trial court properly granted defendants summary judgment. *See* Miss. R. Civ. P. 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."). In other words, as this Court has explained, "[t]he law is clear that the party opposing the [summary

judgment] motion is required to bring forward significant probative evidence demonstrating the existence of a triable issue of fact." *Buckel v. Chaney*, 47 So.3d 148, 157 (Miss. 2010); *see also Drummond v. Buckley*, 627 So.2d 264, 267 (Miss. 1993); *Palmer v. Biloxi Reg'l Med. Ctr.*, 564 So.2d 1346, 1355-56 (Miss. 1990); *Brown v. Credit Ctr., Inc.*, 444 So.2d 358, 362 (Miss. 1983). That simple point resolves this case: as the trial court noted, "there is no genuine dispute that the damage to Plaintiffs' home was caused by excluded flooding." (R. 2008, R.E. 31 at 7; *see also* R. 2009, R.E. 31 at 8 ("Plaintiffs concede they have no evidence that any of the damage to their property was actually caused by wind, a covered peril."); *id.* ("Plaintiffs' own engineering expert could not opine that wind had damaged the Robichaux property prior to the storm surge."); *id.* ("[T]here is no 'genuine issue' of whether Plaintiffs' property was destroyed by Hurricane Katrina's flood waters and Defendants are entitled to judgment as a matter of law.").)

Plaintiffs apparently recognized below that Mott's testimony doomed their case, and—as the trial court noted—"attempted to offer belated causation testimony from Mr. Rocco Calaci, their designated meteorologist." (R. 2009, R.E. 31 at 8.) As the trial court explained, however, Calaci "is not qualified to offer such an opinion." (*Id.* (citing *Medical Plaza, LLC v. United States Fid. & Guar. Co.*, No. 1:07CV098-LTS-RHW, 2008 WL 4539587, at *2 (S.D. Miss. Oct. 7, 2008) (Senter, J.) (limiting Calaci's testimony to meteorological opinions because he lacks "the engineering background necessary to calculate and testify concerning the direct physical effect of the storm forces on the insured building").) An expert meteorologist is qualified to offer opinions about the weather, not about the cause of property losses. *See Medical Plaza*, 2008 WL 44539587, at *2 ("I do not believe Calaci is qualified to express engineering opinions concerning the cause of the damage to the insured building, and his opinions in the field of engineering will be excluded."). Indeed, that is precisely why plaintiffs hired an expert engineer, Mott, to opine as to the cause of their property losses. Plaintiffs ***do not challenge*** the trial

court's conclusion that Calaci was "not qualified" to testify on causation. Needless to say, having failed to mount any such challenge in their opening brief, plaintiffs are foreclosed from mounting such a challenge for the first time in their reply brief. *See, e.g.*, *Paw Paw Island Land Co. v. Issaquena & Warren Counties Land Co., LLC*, 51 So.3d 916, 928 (Miss. 2010) ("[I]t is improper to raise new arguments in a reply brief."); *see also Bishop v. State*, 882 So.2d 135, 154-55 (Miss. 2004); *Watts v. State*, 492 So.2d 1281, 1291 (Miss. 1986); *Overstreet v. Allstate Ins. Co.*, 474 So.2d 572, 577 (Miss. 1985).

Plaintiffs' failure to create a genuine issue of material fact with respect to causation disposes of this case, and warrants affirmance of the judgment. But the trial court also relied on a separate and independent (although related) ground that provides an alternative basis for affirmance: there is no dispute that plaintiffs sought, and received, full compensation for the losses at issue here from flood insurance, and obviously cannot recover twice for those very same losses. "'[D]ouble recovery for the same harm is not permissible.'" *City of Jackson v. Estate of Stewart ex rel. Womack*, 908 So.2d 703, 711 (Miss. 2005) (quoting *Medlin v. Hazlehurst Emergency Physicians*, 889 So.2d 496, 500-01 (Miss. 2004)); *see also R.K. v. J.K.*, 946 So.2d 764, 777 (Miss. 2007). The trial court analyzed each one of the various types of loss alleged (*e.g.*, loss to dwelling, loss to other structures, loss to personal property), and noted that plaintiffs had presented no evidence to rebut defendants' evidence that those losses had been fully compensated by flood insurance. (*See, e.g.*, R. 2010, R.E. 31 at 9 ("Plaintiffs offer ***no evidence*** that the damage to their dwelling was uncompensated such that they are entitled to damages under Coverage A of their policy.") (emphasis added);[2] R. 2011, R.E. 31 at 10

[2] Indeed, plaintiffs appear to have recovered ***more*** than the value of their home from flood insurance. It is undisputed that plaintiffs recovered $136,500 from their flood insurance for the loss of their home. (*See* R. 2010, R.E. 31 at 9; R. 869, R.E. 18 at Exh. 15.) And plaintiffs themselves estimated the overall value of their real property at $165,000, based on the sale of a neighbor's property before the hurricane. (*See* R. 2010, R.E. 31 at 9; R. 548-9, R.E. 18 at Exh.

("Plaintiffs offer ***no evidence*** of any uncompensated loss to their other structures.") (emphasis added); *id.* ("Plaintiffs offer ***no evidence*** to show that the damage to their contents was caused by wind.") (emphasis added).)[3]

Plaintiffs argued below, and argue again here, that they did not need to present any evidence whatsoever to survive defendants' motion for summary judgment. (*See, e.g.*, Pls.' Br. at 19; R. 2009, R.E. 31 at 8 ("Plaintiffs rel[y] ... on the assertion that they had no burden to demonstrate wind damage under Mississippi law.").) That argument rests on a fundamental misunderstanding of summary judgment law. As noted above, where, as here, the party moving for summary judgment presents evidence in support of its position, the nonmoving party must present contrary evidence to create a genuine issue of material fact. *See, e.g.*, Miss. R. Civ. P. 56(e); *Buckel*, 47 So.3d at 153, 157; *Drummond*, 627 So.2d at 267; *Palmer*, 564 So.2d at 1355; *Brown*, 444 So.2d at 362-64. In other words, "[t]he non-moving party may not defeat the motion merely by making general allegations or unsupported denials of material fact." *Drummond*, 627 So.2d at 267 (citing, *inter alia*, *Palmer*, 564 So.2d at 1356); *see also Buckel*, 47 So.3d at 153 (quoting *Brown*, 444 So.2d at 362) (same). Given plaintiffs' failure, in response to defendants' motion for summary judgment, to identify any evidence that they suffered uncompensated losses

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2.) Given that the value of the land (based on tax records) was $53,860, (*see* R. 2010, R.E. 31 at 9; R. 573, R.E. 18 at Exh. 2,) that means that the value of ***all*** the improvements to the land (including the dwelling) was only $111,140, well below the $136,500 they received from flood insurance for the loss of the dwelling.

[3] Plaintiffs argued below that their insurance expert, Donald Dinsmore, provided evidence of uncompensated losses. As the trial court pointed out, however, Dinsmore's replacement cost opinion was "based entirely on estimated square footage costs provided by Plaintiffs' counsel," and thus "does not meet the requirements of *Daubert*, is irrelevant, and is inadmissible." (R. 2010, R.E. 31 at 9.) Plaintiffs have not challenged that ruling on appeal; indeed, their opening brief on appeal does not even ***mention*** Dinsmore. Accordingly, that issue is not part of this appeal and, of course, plaintiffs cannot ***make*** it part of this appeal for the first time in their reply brief. *See, e.g.*, *Paw Paw Island*, 51 So.3d at 928; *Bishop*, 882 So.2d at 154-55; *Watts*, 492 So.2d at 1291; *Overstreet*, 474 So.2d at 577.

caused by a covered peril, there was no basis for a trial, and the trial court properly granted defendants summary judgment. "[Summary] judgment . . . shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c).

This approach is completely consistent with settled Mississippi law regarding the burden of proof in insurance coverage cases involving "all risk" policies. *See, e.g.*, *Corban*, 20 So.3d at 618-19. Here, plaintiffs had the initial burden of showing that a loss occurred, *see id.*, and they carried that burden. The burden then shifted to defendants to show by a preponderance of the evidence that the loss was caused by an excluded peril. *See id.* As the trial court recognized, defendants carried that burden by showing, in the evidence attached to their summary judgment motion, that the losses at issue here were caused by flooding, and that plaintiffs were fully compensated for those losses by flood insurance. (*See* R. 2009-12, R.E. 31 at 8-11.) Plaintiffs presented no evidence to create a genuine issue of material fact on causation, or the existence of an uncompensated loss, so the trial court properly granted defendants summary judgment.

Having decided that plaintiffs failed to create a genuine issue of material fact as to the existence of uncompensated losses caused by a covered peril, the trial court readily, and correctly, proceeded to grant defendants summary judgment on the remaining coverage claims.

First, the trial court correctly held that plaintiffs' claim for living expense coverage fails as a matter of law because "in order to qualify for additional living expenses under the subject homeowner's policy, Plaintiffs' residence must be rendered uninhabitable by a covered event." (R. 2011, R.E. 31 at 10.) In addition, the trial court noted that "Plaintiffs fail to offer sufficient proof that they actually incurred uncompensated living expenses," because they "have not provided Defendants with any receipts for additional living expenses," as required by the

policy—"much less any receipts showing that they spent over $2,500," the amount of additional living expenses that Nationwide provided them in the immediate aftermath of the hurricane. (R. 2012, R.E. 31 at 11; *see also* R. 847-49, R.E. 18 at Exh. 9.) Plaintiffs have not challenged any of these points in their opening brief, and cannot challenge them for the first time in their reply brief. *See, e.g.*, *Paw Paw Island*, 51 So.3d at 928; *Bishop*, 882 So.2d at 154-55; *Watts*, 492 So.2d at 1291; *Overstreet,* 474 So.2d at 577.

Second, the trial court correctly held that plaintiffs' claim for replacement cost coverage fails as a matter of law because plaintiffs are not entitled to such coverage if they are not entitled to "dwelling and contents coverage" in the first place, so the issue of replacement cost coverage is "effectively moot." (R. 2013, R.E. 31 at 12.) In addition, the trial court noted that "it is undisputed that Plaintiffs have not repaired or replaced their dwelling," and that "Plaintiffs have offered no proof of actual and incurred costs for the replacement of their contents." (*Id.*) Plaintiffs have not challenged any of these points in their opening brief, and cannot challenge them for the first time in their reply brief. *See, e.g.*, *Paw Paw Island*, 51 So.3d at 928; *Bishop*, 882 So.2d at 154-55; *Watts*, 492 So.2d at 1291; *Overstreet,* 474 So.2d at 577.

Third, the trial court correctly held that plaintiffs' claim for building ordinance or law coverage fails as a matter of law because "Plaintiffs have offered no proof that they are entitled to additional dwelling coverage under the policy." (R. 2013, R.E. 31 at 12.) In addition, the trial court noted that "Plaintiffs have not 'repaired or replaced [their structure] at the residence premises,' a requirement of the policy, and so they cannot invoke this coverage." (*Id.* (quoting R. 88).) Plaintiffs have not challenged any of these points in their opening brief, and cannot challenge them for the first time in their reply brief. *See, e.g.*, *Paw Paw Island*, 51 So.3d at 928; *Bishop*, 882 So.2d at 154-55; *Watts*, 492 So.2d at 1291; *Overstreet,* 474 So.2d at 577.

Fourth, the trial court correctly held that plaintiffs' claim for water back up coverage fails as a matter of law because "Plaintiffs had not purchased this option and thus cannot now seek coverage under it." (R. 2013, R.E. 31 at 12.) In addition, the trial court noted that "Plaintiffs have produced no evidence of water back up, and were unable to identify any such evidence at the hearing." (*Id.*) Plaintiffs have not challenged any of these points in their opening brief, and cannot challenge them for the first time in their reply brief. *See, e.g.*, *Paw Paw Island*, 51 So.3d at 928; *Bishop*, 882 So.2d at 154-55; *Watts*, 492 So.2d at 1291; *Overstreet,* 474 So.2d at 577.

Fifth, the trial court correctly held that plaintiffs' claim for debris removal and landscaping coverage fails as a matter of law because "neither hurricane damage nor other weather damage is one of the named perils that would qualify the plaintiffs for coverage under this contractual provision." (R. 2014, R.E. 31 at 13.) In addition, the trial court noted that "Plaintiffs have not produced or identified any evidence of actual expenses for debris removal or landscaping expenses." (*Id.*) Plaintiffs have not challenged any of these points in their opening brief, and cannot challenge them for the first time in their reply brief. *See, e.g.*, *Paw Paw Island*, 51 So.3d at 928; *Bishop*, 882 So.2d at 154-55; *Watts*, 492 So.2d at 1291; *Overstreet,* 474 So.2d at 577.

Sixth, the trial court correctly held that plaintiffs' claim for inflation coverage fails as a matter of law because "Plaintiffs have offered no proof that they are entitled to additional dwelling coverage under the subject policy." (R. 2014, R.E. 31 at 13.) In addition, the trial court noted that "Plaintiffs offer no evidence, expert or otherwise, of the alleged inflation costs." (*Id.*) Plaintiffs have not challenged any of these points in their opening brief, and cannot challenge

them for the first time in their reply brief. *See, e.g.*, *Paw Paw Island*, 51 So.3d at 928; *Bishop*, 882 So.2d at 154-55; *Watts*, 492 So.2d at 1291; *Overstreet,* 474 So.2d at 577.[4]

Finally, the trial court properly rejected plaintiffs' non-contractual claims for constructive trust, unjust enrichment, equitable estoppel, equitable reformation, and fraud. (*See* R. 2014-16, R.E. 31 at 13-15.) As relevant here, the court rejected plaintiffs' fraud claims based on the theory that Jay Fletcher Insurance orally assured them that they had coverage for flooding caused by a hurricane under their homeowners policy and thus did not need additional coverage under their flood policy. As the trial court explained, that theory fails as a matter of law for two separate and independent reasons. ***First***, plaintiffs failed to create a genuine issue of material fact as to whether they would have purchased additional flood insurance but for the alleged misrepresentations. (*See* R. 2015-6, R.E. 31 at 14-15.) To the contrary, the undisputed record here establishes that "independent of any statements by Jay Fletcher Insurance, Plaintiffs consistently sought to have as much flood insurance as they could afford," and in fact purchased flood insurance that more than covered the value of their property. (*Id.*) ***Second***, in any event, any reliance on Fletcher's alleged oral representations would have been unreasonable as a matter of law because "the alleged representations contradict the clear terms" of the written insurance policy. (R. 2016, R.E. 31 at 15 (citing, *inter alia*, *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co.*, 584 So.2d 1254, 1257 (Miss. 1991)).)

B. Plaintiffs' Various Challenges To The Trial Court's Decision Are Unavailing.

Plaintiffs' opening brief is noteworthy for its failure to challenge the grounds, described above, for the trial court's decision against them. Rather, plaintiffs devote their efforts primarily to discussing various issues that have no bearing on the outcome of this case.[5]

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[4] The trial court further noted that plaintiffs conceded their claim for injunction, specific performance, and indemnity, as well as their claim for extra-contractual damages, bad faith, and punitive damages. (*See* R. 2015-16, R.E. 31 at 14-15.)

First, plaintiffs cite the so-called "anti-concurrent causation" clause in their policy, which provided that loss from an excluded peril is "excluded even if another peril or event contributed concurrently or in any sequence to cause the loss." (*See* Pls.' Br. at 23-27.) But the trial court did not rely upon that clause in granting defendants summary judgment. The clause comes into play when there is a dispute as to whether a given loss was caused by wind (a covered peril) or flooding (an excluded peril). *See, e.g.*, *Corban*, 20 So.3d at 616. The problem for plaintiffs here, as explained above, is that they failed to create a genuine issue of material fact with respect to the cause of their losses. Accordingly, plaintiffs' extensive arguments about the interpretation of the anti-concurrent causation clause miss the point.[6] It is simply not true, as plaintiffs assert, that "the trial court has adopted the position that any loss that storm surge would have caused,

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[5] Plaintiffs assert in passing (although it is not one of the points of error challenged in their opening brief) that the trial court held that "Plaintiffs' [*sic*] cannot prove their case ***because*** 'there were no eyewitnesses to the damage to the Robichaux home during Hurricane Katrina.'" (Pls.' Br. at 11 (quoting R. 2008, R.E. 31 at 7 (emphasis added)); *see also id.* at 11 n.2.) That assertion is incorrect. The trial court merely noted that there were no eyewitnesses to the damage, (*see* R. 2004, 2008, R.E. 31 at 3, 7,) but neither held nor suggested that this point precluded plaintiffs from proving their case. Rather, as noted in the text, the trial court ruled against plaintiffs on the ground that they failed to present a genuine issue of material fact as to the existence of uncompensated damage from a covered peril.

[6] The most the trial court said about the anti-concurrent causation clause was to observe, in *dicta*, that plaintiffs' anti-concurrent causation argument failed on its own terms. "[E]ven had Plaintiffs offered competent evidence of wind damage"—which they did not—"there is no dispute that it would have occurred 'concurrently or in any sequence' with flood damage" under the facts of this case. Here, plaintiffs' own causation expert Mott "concluded that, had there been any wind damage, it would 'have been still occurring as the storm surge was arriving.'" (R. 2009-10, R.E. 31 at 8-9; *see also* R. 650, R.E. 18 at Exh. 5.) Such contemporaneous concurrent damage is what the anti-concurrent causation clause is all about. *See, e.g.*, *Corban*, 20 So.3d at 616 ("The [anti-concurrent causation] clause applies only if and when covered and excluded perils contemporaneously converge, operating in conjunction, to cause damage resulting in loss to the insured property."); *id.* at 618 ("[W]hen facts in a given case establish a truly 'concurrent' cause, *i.e.*, wind and flood simultaneously converging and operating in conjunction to damage the property, . . . there is an 'indivisible' loss which would trigger application of the [anti-concurrent causation] clause."); *id.* at 619 (anti-concurrent causation clause "comes into play only when 'flood damage' is a cause or event contributing concurrently to the loss.") (emphasis and brackets omitted).

irrespective of prior damage, is excluded," (Pls.' Br. at 13,) and plaintiffs (not surprisingly) provide no citation for that remarkable assertion. To the contrary, the trial court initially ***granted*** plaintiffs partial summary judgment with respect to their interpretation of the clause, and only reversed course when its decision to grant defendants plenary summary judgment effectively mooted the partial summary judgment in plaintiffs' favor. (*See* 9/2/09 Hrg. Tr. at 132.)[7] Plaintiffs never come to terms with the fact that the trial court did not rely on the anti-concurrent causation clause in ruling against them.[8]

Second, plaintiffs argue at great length about the relevance of evidence regarding Nationwide's adjustment of their neighbors' property-damage claims. (*See* Pls.' Br. at 27-32.) This argument is a classic red herring. Regardless of whether such evidence is relevant (an issue the trial court here did not address), it certainly does not suffice, on the facts of this case, to defeat summary judgment. Plaintiffs cannot create a genuine issue of material fact regarding the cause of their ***own*** losses, which their own causation expert did not dispute were caused by flooding and for which they were fully compensated by flood insurance, (R. 2009, R.E. 31 at 8,) by trying to change the subject to the cause of ***someone else***'s losses.

Third, plaintiffs argue that the trial court "improperly dismissed" their claims against defendant Jay Fletcher Insurance for "unjust enrichment, equitable fraud, and fraud." (Pls.' Br. at 32 (capitalization modified).) In particular, plaintiffs assert that "[a]t the urging of Fletcher

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[7] Similarly, the trial court did not rely on the so-called "weather exclusion" provision in granting defendants summary judgment, and defendants never relied on that exclusion in denying coverage in this case, so plaintiffs' argument about that provision, (*see* Pls.' Br. at 18 (citing *Dickinson v. Nationwide Mut. Fire Ins. Co.*, No. 1:06cv198 LTS-RHW, 2008 WL 941783 (S.D. Miss. 2008),) is likewise misplaced.

[8] In any event, plaintiffs' arguments that the anti-concurrent causation clause is either ambiguous or unenforceable (or both), (*see* Pls.' Br. at 14-18, 23-27,) are incorrect. This Court explained in *Corban* how an anti-concurrent causation clause is to be construed (and reconciled with a hurricane coverage clause), *see* 20 So.3d at 616, and—as thus construed—the clause is unambiguous and enforceable.

Insurance, Plaintiffs, rather than increasing the amount of coverage under their flood policy, purchased a Hurricane Endorsement." (*Id.*) According to plaintiffs, their claims against Jay Fletcher Insurance "presented a fact question" regarding "Mr. Robichaux's credibility" that should have been decided by a jury. (*Id.* at 33.)[9]

Contrary to plaintiffs' assertion that their fraud claims presented a fact question for the jury, it is black-letter law that such claims require, among other things, proof that the defendant made a materially false representation upon which plaintiffs reasonably relied in a manner that proximately injured them. *See, e.g., Koury v. Ready*, 911 So.2d 441, 445 (Miss. 2005). Here, plaintiffs allege that Jay Fletcher Insurance told them that their homeowners policy would cover flooding damage from a hurricane, and that they reasonably relied on that representation by purchasing less flood insurance than they otherwise would have done. (*See* R. 351, R.E. 10 at 17; R. 519, R.E. 18 at Exh. 2.) As the trial court explained, however, plaintiffs failed to create a genuine issue of material fact regarding any such reliance, because the undisputed factual record showed that they purchased as much flood insurance as they could afford, and indeed that flood insurance more than covered the losses at issue here. (*See* R. 2015-16, R.E. 31 at 14-15; *see also* R. 755, 756, R.E. 18 at Exh. 7.) Moreover, any such reliance on alleged oral representations by Jay Fletcher Insurance would have been unreasonable as a matter of law, because such representations would have contradicted the written terms of the policy (which plaintiffs had a legal duty to read). *See, e.g., Mladineo,* 52 So.2d at 1166; *see also Stephens v. Equitable Life*

[9] Although plaintiffs purport to challenge the trial court's disposition of their unjust enrichment claim, as well as their fraud claims, against Jay Fletcher Insurance, their opening brief presents no argument relating to the court's disposition of the unjust enrichment claim. Rather, the argument in the brief is limited to the court's disposition of the fraud claims. (*See* Pls.' Br. at 32-33.) Accordingly, plaintiffs have waived any challenge to the trial court's disposition of their unjust enrichment claim against Jay Fletcher Insurance, and cannot raise such a challenge for the first time in their reply brief. *See, e.g., Paw Paw Island,* 51 So.3d at 928; *Bishop*, 882 So.2d at 154-55; *Watts*, 492 So.2d at 1291; *Overstreet,* 474 So.2d at 577.

Assurance Soc'y of U.S., 850 So.2d 78, 83 (Miss. 2003); *Godfrey*, 584 So.2d at 1257; *Gulf Guar. Life Ins. Co. v. Kelley*, 389 So.2d 920, 922 (Miss. 1980) (en banc); *Leonard v. Nationwide Mut. Ins. Co.*, 499 F.3d 419, 438-42 (5th Cir. 2007) (applying Mississippi law). Indeed, the policy explicitly provided that "a waiver or change of a part of this policy must be in writing by us to be valid." (R. 90, R.E. 2 at Exh. A.) When an insurer provides its insured with a policy clearly limiting the ability of agents to modify contracts, those agents are not vested with either ***actual*** or ***apparent*** authority to do so. *See, e.g., Barhonovich v. American Nat'l Ins. Co.*, 947 F.2d 775, 777-78 (5th Cir. 1991) (applying Mississippi law).

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment.

Respectfully submitted, this the 30th day of March, 2011.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY and JAY FLETCHER INSURANCE, Appellees

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CERTIFICATE OF SERVICE

I, H. Mitchell Cowan, one of the attorneys for defendants/appellees, do hereby certify that I have this day forwarded by United States Mail, postage prepaid, a true and correct copy of the above and foregoing document to the following:

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THIS the 30th day of March, 2011.

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